

Sumter City-County Planning Commission

November 10, 2010

BOA-10-30, Harold C. Gillens – Stonevale Commons- 1415 Furman Dr. (County)

I. THE REQUEST

Applicant:	Harold Gillens
Status of the Applicant:	Property Owner.
Request:	An Appeal of the Zoning Administrator's denial of the issuance of a zoning/building permit on the grounds the permit was in conflict with recorded restrictive covenants.
Location:	1415 Furman Dr.
Present Use/Zoning:	Vacant/GR
Tax Map Reference:	155-07-01-009
Adjacent Property Land Use and Zoning:	North – Res./church/GR South – Res./GR East – Res./School/GR West – Res./GR

II. BACKGROUND

Section 6-29-1145 of the South Carolina Code of Laws prohibits the Planning Department from issuing a permit when it has knowledge that a restrictive covenant conflicts with the requested use or activity.

The law states that it is the Planning Departments responsibility to inquire of the applicant as to the existence of such covenants. As part of the site plan review process for the duplex, the applicant indicated, in response to such an inquiry, that no conflicting covenants existed. The site plan was approved by the Planning Commission on April 28, 2010 (MSP 09-22).

On or about June 24, 2010, a copy of the applicable restrictive covenants was submitted to the planning department by adjacent property owners, concerned over the proposed duplex project. This submission coincided with both building and planning staff review of the building permit—

in which the Zoning Administrator is responsible for the zoning review (is the use permitted, etc...) and the building official responsible for the issuance of the building permit.

Upon a review of the restrictive covenants, the Zoning Administrator concluded that the covenants permitted *only* single family residential uses and therefore, duplex units were in conflict with the covenants. Also, the Zoning Administrator reviewed the established development pattern in the subdivision subject to the restrictive covenants and found all units constructed to date were of the single family variety. No duplex or multi-family uses have been constructed. Thus, in accordance with State Law, the Zoning Administrator withheld zoning approval.

III. APPEAL

The applicant and property owner, Harold Gillens, is appealing the Zoning Administrator's decision to withhold zoning approval for his proposed duplex project on property located at the corner of Furman Dr. and Reading St. The Zoning Administrator's interpretation is based on a finding that the use--duplex units-- conflicts with the Restrictive Covenants as recorded for this property in the Sumter County Register of Deeds in Plat Book Z-14, page 94 and Deed Book T-7, page 406 (**Exhibit 1**). This property is currently zoned general residential. The Sumter County Zoning Ordinance allows duplexes as an outright permitted use in the general residential zoning district.

Planning Staff reviewed this project for compliance with all zoning and technical regulations under normal site plan review processes in April 2010. At time of this review, staff was not made aware by the property owner of any Restrictive Covenants on this property which may conflict with our review. Property owners are responsible by State Law to provide any covenants to the staff during application of a Major Site Plan (in response to Staff inquiry) but the property owner failed to disclose this information to staff at the time of review and recommendation to the Planning Commission.

Planning Commission approved this Major Site Plan (MSP-09-22) on April 28, 2010 (**Exhibit 2**). Site plan was approved for 3 duplex structures (6 units) on a 1.2 acre parcel zoned general residential contingent upon revised landscaping plan and encroachment permits from SCDOT. The encroachment permit has been approved by SCDOT.

This project site consists of two lots which are part of the original subdivision from the estate of Furman Richard Dabbs which was first established in 1957.

After the Major Site Plan was approved by the Planning Commission Board and property owner was in the process of applying for building permits, planning staff received a copy of the Restrictive Covenants from one of the residents when they heard about this proposed project. The Zoning Administrator reviewed, consulted with the County Attorney and on July 13, 2010 sent letter informing the applicant that there appeared to be some legal matters concerning the duplexes as a permitted use under these covenants and all permits associated with this project were suspended until this was resolved (**Exhibit 3**).

Planning staff received a letter from Mr. Warren Curtis, attorney for applicant, dated August 10, 2010 notifying our office that he was representing Mr. Gillens on this project and requested in writing our interpretation of the covenants and the specific reasons why the Planning Office was prohibiting use of the property for duplexes.

On August 24, 2010 the Zoning Administrator responded to Mr. Curtis with a formal zoning opinion letter. (**Exhibit 4**)

Zoning Administrator Position

It is the opinion of the Zoning Administrator that the restrictive covenants permit no residential uses other than single family houses. The Applicant proposes 3 duplex structures (6 total units) on the subject property. Therefore, the covenants conflict with the proposed use, in violation of Section 6-29-1145 of South Carolina State Law (**Exhibit 5**).

Section 6-29-1145 states in relevant part:

If a Planning agency has notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity... the local planning agency must not issue the permit...

The Zoning Administrator has notice and therefore cannot issue a zoning approval. The duplex units are not permitted in this location. Two primary facts lead to this conclusion:

First, restrictive covenant #1 states in full: *That no lot shall be used except for residential building purposes and that no building shall be erected, altered, placed or permitted to remain on any such lot other than **a family dwelling** and such outbuildings as are incidental (emphasis added).*

The key word is the singular tense --“a family dwelling.” The Zoning Administrator finds only strict interpretation may be used and the covenant intended to permit only single family units. The covenant does not state that a townhouse, attached family dwelling, or multi-facility dwelling is permitted.

Second, every improved lot in this original subdivision has a single family dwelling built on it. No other type unit exists in this development. There are a few vacant lots remaining. A site visit conducted by staff on October 26, 2010 supports this conclusion. The scheme of development is single family ranch style dwellings. This has been the plan for construction since the recording of this subdivision plat in 1957 (**Exhibit 6**) and fits within the covenants filed on this property. We have included an aerial picture of existing conditions for the lots on the plat numbered 1 through 44 (**Exhibit 7 and Exhibit 8**).

Staff received application for Appeal of Decision of Zoning Administrator on September 20, 2010 within the 30 day time period required for filing an appeal by Zoning Ordinance.

IV. ADMINISTRATION

The Board of Zoning Appeals shall have the following powers and duties:

- a. **Appeals from administrative interpretation:** To hear and decide appeals where it is alleged there is an error in an order, requirement, decision, or determination made by an administrative official of the Sumter City-County Planning Commission in the enforcement of the Zoning Ordinance.
 1. An appeal shall be taken within thirty (30) days from the date of the decision rendered by the Zoning Administrator by filing with his or her office a written notice of appeal specifying the grounds thereof.
 2. Appeals shall be submitted on application forms obtained from the Zoning Administrator.
 3. All papers constituting the record upon which the appeal action was taken shall forthwith be transmitted to the Board of Zoning Appeals.
 4. An application fee to be utilized for the incidental costs of administration and advertisement shall accompany appeal applications.
 5. Any communication purporting to be an application for an appeal shall be regarded as mere notice to seek relief until it is made in the form required.

ROLE OF THE BOARD OF APPEALS

The Board has the exclusive power to hear and decide appeals where it is alleged the Zoning Administrator, in enforcement of the Zoning Ordinance, erred in an order, requirement, decision or determination. In such cases, the board may reverse or affirm, wholly or in part, or may modify the order, requirements, decision or determination of the Zoning Administrator. The Board has all the powers of the Zoning Administrator in such cases and may issue or direct the issuance of a permit. *S. C. Code 6-29-800 (A)(1) and (E).*

In its decision on an administrative appeal from a decision of the Zoning Administrator, the Board is not bound by the conclusion or reasoning of the Zoning Administrator and may consider and apply the appropriate provisions of the Zoning Ordinance as dictated by the facts before it.

IV. DRAFT MOTIONS for BOA-10-30

- A. I move that the Zoning Board of Appeals deny BOA-10-30, subject to the findings of fact and conclusions: (Note: A vote to deny **UPHOLDS** the Zoning Administrator decision).
- B. I move that the Zoning Board of Appeals approve BOA-10-30 on the following findings of fact and conclusions: (Note: A vote to approve **OVERTURNS** the Zoning Administrator decision).
- C. I move that the Zoning Board of Appeals enter an alternative motion for BOA-10-30.

V. ZONING BOARD OF APPEALS – NOVEMBER 10, 2010

The Sumter City-County Board of Zoning Appeals at its meeting on Wednesday, November 10, 2010, voted to overturn the Zoning Administrators decision and approve this request.

ATTACHMENTS

- Exhibit 1 – Restrictive Covenants
- Exhibit 2 – Site Plan, Building elevations, Building elevations, Application
- Exhibit 3 – Letter to Mr. Gillens
- Exhibit 4 – Letter to Mr. Curtis
- Exhibit 5 – SC Code of Laws
- Exhibit 6 – Original recorded plat
- Exhibit 7 – Aerial
- Exhibit 8 – Existing Conditions
- Exhibit 9 – Order on Appeal

**Exhibit 9--Revised
Order on Appeal
Sumter Board of Appeals**

**BOA-10-30, Harold Gillens
Appeal from the Interpretation of the Zoning Administrator
November 10, 2010**

Date Filed: November 10, 2010

Permit Case No. BOA-10-30

The Sumter Board of Appeals held a public hearing on Wednesday, November 10, 2010 to consider the appeal of Harold Gillens, 1415 Furman Dr. Sumter, SC 29154 for an appeal of the interpretation of the Zoning Administrator as set forth on the Form 2. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions:

Facts:

- Appellant proposes to construct duplex units on the subject property.
- Property is subject to Restrictive Covenants dated May 1, 1957.
- In accordance with Restrictive Covenants recorded in Deed Book T-7 at page 406 in office of the Clerk of Court on May 1, 1957 a family dwelling is allowed on the subject property.

Conclusions:

- "A family dwelling", as used in these restrictive covenants, is not limited in its meaning to just single family dwelling units. A duplex unit, as proposed by the Appellant, is a family dwelling for purposes of these restrictive covenants.
- The restrictive covenants do not conflict with the requested activity to place duplex units on the parcel.
- The Zoning Administrator erred in her interpretation of the restrictive covenants

THE BOARD, THEREFORE, ORDERS that the appeal is ☒ **GRANTED**

Date issued: 11-10-10


Chairman

Date mailed to parties in interest: 11-12-10


Secretary

Notice of appeal to Circuit Court must be filed within 30 days after date this Order was mailed.